Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States
October Term, 1998

BOARD OF TRUSTEES OF THE UNIVERSITY OF CONNECTICUT and THE UNIVERSITY OF CONNECTICUT

Petitioners,

v.

CLIFFORD DAVIS; BILLIE LEVY, Executrix of the Estate of NATHAN LEVY, JR.; and ROBERT BARD

Respondents,

– and –

UNITED STATES OF AMERICA

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

1. Whether the Eleventh Amendment to the United States Constitution immunizes States from private suits in federal district courts alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et. seq.

LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, the plaintiffs were Clifford Davis; Billie Levy, Executrix of the Estate of Nathan Levy, Jr.; and Robert Bard.

The defendants in both courts below were the Board of Trustees of the University of Connecticut and the University of Connecticut.

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NO. _____

In The
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BOARD OF TRUSTEES OF THE UNIVERSITY OF CONNECTICUT and THE UNIVERSITY OF CONNECTICUT

Petitioners,

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Respondents,

and UNITED STATES OF AMERICA

Intervenor Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, the Board of Trustees of the University of Connecticut and the University of Connecticut, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 23, 1998.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as Cooper v. N.Y. State Office of Mental Health,[1/] 162 F.3d 770 (2d Cir. 1998) (App. 1-19). The decision of the United States District Court for the District of Connecticut (App. 20-28) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 23, 1998. No Petition for Rehearing and Suggestion for Rehearing In Banc was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

1/ This case was argued in tandem with two New York cases raising the identical legal issue. The Cooper case was the lead case.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> Section 1. ***** [N] or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The pertinent portions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et. seq., and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, et. seq., are reproduced in the Appendix (App. 29-33).

STATEMENT OF THE CASE

The Respondents are three faculty members at the University of Connecticut School of Law: Clifford Davis, Nathan Levy,[2/] and Robert Bard. In 1992, the Respondents each brought a two-count complaint against the Petitioners, the University of Connecticut Board of Trustees and the University of Connecticut in the United States District Court for the District of Connecticut. The first count of each complaint alleged that salary decisions of the Dean of the Petitioners' School of Law between 1984 and 1990 discriminated against them on the basis of age, in violation of the

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2/ Levy died during the pendency of this action and the Executrix of his estate was substituted, pursuant to Fed. R. Civ. P. 25(a) (1).

Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et. seq. ("ADEA"). Each complaint also had a second pendent count alleging that the salary decisions of the Dean violated the Respondents' rights under Connecticut contract law.

In the early stages of the litigation, the three cases were consolidated. After discovery, the Petitioners filed a motion for summary judgment, pursuant to Fed. R. Civ. P. 56. The first ground, which is not relevant to this petition, raised statute of limitation issues. The second ground, addressed to the pendent count only, alleged that the Eleventh Amendment precluded the exercise of the district court's jurisdiction over the state law claim.[3/] On September 6, 1996, a magistrate judge recommended that the Petitioners' motion on the statute of limitations issue be denied. However, she recommended that the pendent claim be dismissed, inasmuch as the University of Connecticut is an arm of the State for Eleventh Amendment purposes, citing Banerjee v. Roberts, 641 F. Supp. 1093, 1098 (D. Conn. 1986). On September 27, 1996, the Petitioners objected to the portion of the magistrate judge's recommended ruling that was adverse to them and simultaneously filed a motion to dismiss, asserting that the intervening decision in Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) deprived the district court of subject matter jurisdiction over the ADEA count. On September 30, 1996, the district court adopted the magistrate judge's decision and

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3/ The motion was filed on February 1, 1994. At the time, the controlling legal authority authorized suits against States in a Federal ADEA suit. EEOC v. Wyoming, 460 U.S. 226 (1983).

ordered the parties to fully brief the issues raised by the Petitioners' motion.

In a decision dated September 30, 1997, the district court denied the Petitioners' motion, holding that the ADEA was enacted pursuant to Congress' authority under Section 5 of the Fourteenth Amendment (App. 20-28). The district court first concluded that the inclusion of the phrase "State or Political Subdivision of a State or any agency or instrumentality of a State" in the ADEA's definitional section (29 U.S.C. § 630 (b) (2)) was a sufficient indication of congressional intent to abrogate the Eleventh Amendment immunity of the State. (App. 23, n.3.)

The district court analyzed the question of whether the ADEA was a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment. Citing a variety of cases but relying in large part upon EEOC v. Elrod, 674 F.2d 601 (7th Cir. 1982), the court concluded that "the ADEA is a civil rights law that enforces the Fourteenth Amendment guarantee of equal protection." (App. 24.) Its rationale had three parts. First, according to the district court, the ADEA's drafting was similar to that contained in Title VII, which is appropriate Section 5 legislation. Second, according to the district court, the ADEA's "congressional purpose" was "to prevent arbitrary age discrimination." (App. 25.) Third, the district court's analysis of the legislative history (citing Elrod) led to its conclusion that "Congress viewed ADEA as filling a gap in the federal civil rights laws." (App. 25.) Again citing Elrod, the district court, tellingly, observed that the legislative history of the 1974 ADEA amendments was "not explicit." (App. 25.) Finally, the district court addressed the Petitioners' contentions based upon Seminole Tribe,

stating that it did "not find the defendants' argument persuasive." (App. 27.)

On appeal, this case was argued in tandem with two New York State agency cases raising the identical issues. The court of appeals affirmed, focusing most of its opinion on the question of whether the 1974 amendments to the ADEA contained sufficient indicia of congressional intent to abrogate the Eleventh Amendment (162 F.3d at 774-777, App. 9-17). The court recognized that the ADEA's enforcement provision, 29 U.S.C. § 626(c)[4/] had precisely that same language found to be insufficient to abrogate Eleventh Amendment immunity that was at issue in Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279 (1973), which arose under the Fair Labor Standards Act (FLSA) (162 F.3d at 775, App. 11). The court also acknowledged that congressional intent to abrogate must be "unmistakably clear," citing Dellmuth v. Muth, 491 U.S. 223, 228 (1989). However, the court concluded that the inclusion of States as "employers" in 29 U.S.C. § 630 (b) removed ambiguity and subjected States to private ADEA enforcement actions in federal district courts (162 F.3d at 776, App. 14).

The court of appeals' treatment of the pettitioners' arguments concerning Congress' Section 5 enforcement authority was cursory. The court indicated its agreement, "with the overwhelming weight of authority holding that the ADEA was enacted pursuant to § 5 of the Fourteenth

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4/ 29 U.S.C.§ 626(c) provides, in pertinent part:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purpose of this chapter.

Amendment." (162 F.3d at 777, App. 18.) The court stated that the lack of reference to the Fourteenth Amendment in the 1974 ADEA amendments or its history was immaterial; the critical issue in the court's view was whether Section 5 could have been the source of Congress' authority (162 F.3d at 777, App. 18). The court also concluded that although age is not a suspect classification, and age discrimination does not implicate a fundamental right, those factors did not affect Congress' authority. Id.

Finally, the court made little more than a passing reference to City of Boerne v. Flores, 521 U.S. 507 (1997), which had been decided after the district court's decision. The court made no reference to the existence (or non-existence) of a legislative record of employment discrimination by States at the time that the 1974 amendments to the ADEA were adopted. Rather, the court held that the ADEA's application to States was remedial, rather than substantive and thus appropriate Section 5 legislation. The court cited other circuit court cases but engaged in no additional analysis of how or why the ADEA remedial scheme is either congruent or proportional to the problem of age discrimination by State governments.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT AMONG CIRCUITS.

The current state of the law in the courts of appeal has resulted in a conflict that only this Court can resolve. After the Court's decisions in Seminole Tribe and City of Boerne, two courts of appeal, the Eighth Circuit and the Eleventh Circuit, have held that the 1974 amendments to the ADEA either did not abrogate the Eleventh Amendment

immunity of States or that Congress was without authority to extend it to the States. In Humenansky v. Regents of the University of Minn., 152 F.3d 822 (8th Cir. 1998), the Court of Appeals for the Eighth Circuit held that congressional intent to abrogate the immunity of States was insufficiently clear to surmount the Eleventh Amendment bar. Alternatively, the Eighth Circuit held that even if congressional intent were clear, Congress lacked the authority under Section 5 of the Fourteenth Amendment to expand the sweep of the Equal Protection Clause beyond pronouncements of the Supreme Court. In Kimel v. Fla. Bd. of Regents, 139 F.3d of 1426 (11th Cir. 1998), one of the panel members, Judge Edmondson, agreed with the first rationale of the Eighth Circuit; namely, insufficient intent to abrogate. Another panel member, Judge Cox, found sufficient intent to abrogate, but agreed with the alternate holding of Humenansky: Congress had exceeded its Section 5 authority by extending the ADEA to the States.

Every other circuit that has addressed these issues after the Supreme Court's decisions in Seminole Tribe and City of Boerne, has held that there is no impediment to the application of the ADEA to the States. Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Coger v. Bd. of Regents, 154 F.3d 296 (6th Cir. 1998); Scott v. University of Mississippi, 148 F.3d 493 (5th Cir. 1998); Keeton v. University of Nevada Sys., 150 F.3d 1055 (9th Cir. 1998); Goshtasby v. Board of Trustees, 141 F.3d 761 (7th Cir. 1998).

These decisions present an irreconcilable conflict that only this Court can resolve: in two circuits, States cannot be sued in federal district courts for alleged violations of the ADEA by their employees. In view of the alternative holding of the Eighth Circuit, Congress is not empowered to

remedy this conundrum, because it is not within its authority to do so. Further development of the law is unlikely and would add nothing to the pages of the federal reporter beyond what has already been written. There is a compelling need for uniformity on the critical issues raised by this case.[5/]

II. THE COURT OF APPEALS DID NOT PROPERLY ANALYZE THE ISSUE OF WHETHER CONGRESS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF STATES.

The governing legal principles are clear: congressional intent to abrogate the Eleventh Amendment immunity of States must be "unequivocal and textual." Dellmuth v. Muth, 491 U.S. 223, 230 (1989). It must "be said with perfect confidence" that abrogation was intended. "[I]mperfect confidence will not suffice." Id. at 231.

The court of appeals in this case recognized that the enforcement language in the ADEA was precisely the same as the language in Employees v. Missouri Dept. of Public Welfare, 411 U.S. 279 (1973). Indeed, the court framed the arguments of the States as follows:

> The language of unaltered § 626(c) forms the crux of appellants' argument that Congress,

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5/ The Petitioners recognize that this Court has granted certiorari in the Kimel case. In the event, however unlikely, that there is a suggestion of mootness in that case, or it is disposed of on some other procedural or substantive ground, the Court should grant the writ in this case, so that the issue can be definitively resolved.

> in enacting the 1974 ADEA amendments, did not express an unequivocal intent to abrogate the State's immunity from suit in federal court. Appellants point out that § 626(c), which authorizes aggrieved persons to bring their actions "in any court of competent jurisdiction," contains exactly the same enforcement language, see note 5, that the Supreme Court in Employees held did not evidence a clear intent to abrogate state sovereign immunity. Employees, 411 U.S. at 284-86. Appellants further argue that Congress's failure in 1974 to amend the ADEA enforcement provision to refer explicitly to the States, when it had the opportunity to do so and the knowledge (based on Employees) that the then-current enforcement language was insufficient is particularly significant. Appellants acknowledge that the addition of States to the definition of "employer" could be interpreted as an intent to abrogate the Eleventh Amendment, but stress that we still must find an "unmistakably clear" statement of intent, Dellmuth v. Muth, 491 U.S. 223, 228 (1989) for the State's immunity to be deemed abrogated. See also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). Appellants contend that this threshold has not been met.

162 F.3d at 775, App. 11-12 [emphasis in original].

The court of appeals then went to extraordinary lengths to illustrate a proposition that the Petitioners do not dispute: States are employers for purposes of the ADEA.

In that sense, the ADEA is indistinguishable from the Rehabilitation Act under consideration in Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) or the Education of the Handicapped Act that was the subject of Dellmuth. In Atascadero, States were clearly subject to the Rehabilitation Act; they were recipients of federal funding and suits were authorized against any recipients. Yet, this Court held that "a general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." Atascadero, 473 U.S. at 246. In Dellmuth, the Education of the Handicapped Act (EHA) clearly applied to the State and suits were authorized in state or federal courts by aggrieved parties.

Hence, the statutes at issue in this case, as well as Atascadero and Dellmuth, present a single paradigm: States are subject to federal laws, which may be enforced, under the terms of each statute, in courts, including federal courts. In no case is there specific, textual reference to the right of an aggrieved person to bring a private action against a State in federal court. The Petitioners do not dispute that abrogation of Eleventh Amendment immunity is a permissible inference. An inference, however, falls short of the unmistakable expression of congressional intent that the cases require. Dellmuth, 491 U.S. at 232.

The court of appeals' efforts to cabin Atascadero and Dellmuth is unavailing. Equally unpersuasive is the Court's discussion (162 F.2d at 777, App. 16-27) of the reference in 29 U.S.C. § 626(b) to the post-Employees amendment to the FLSA, 29 U.S.C. 216(b). The court of appeals' analysis takes a reference in one statute to another statute's enforcement provision, and adduces congressional intent to abrogate. That is hardly the clear expression of congressional intent to alter "the fundamental constitutional balance

between the Federal Government and the States" [,] Atascadero, 473 U.S. at 238, that is required.

The decision of the court of appeals is contrary to this Court's precedents. Clear, textual expressions of intent to abrogate the Eleventh Amendment are necessary. That requirement was not met when the ADEA was amended in 1974.

III. THE APPLICATION OF THE ADEA TO THE STATES WAS NOT A VALID EXERCISE OF CONGRESS' AUTHORITY TO ENFORCE THE FOURTEENTH AMENDMENT.

Even if this Court were to agree with the court of appeals on the issue of abrogation, the question remains as to whether application of the ADEA was a valid exercise of Congress' Section 5 powers. A review of this Court's precedents leads to the conclusion that Congress was not empowered to extend the ADEA to the States.

The court of appeals had before it substantial arguments raised by the Petitioners, as well as the State of New York, concerning the *sina qua non* for a valid exercise of congressional authority under the Fourteenth Amendment. The court of appeals, although relying in significant part upon EEOC v. Elrod, 674 F.2d 601 (7th Cir. 1982), did not address a core issue in Eleventh Amendment jurisprudence that the Elrod court addressed: whether there was contemporaneous evidence that Congress relied on the Fourteenth Amendment in extending the ADEA to States. The court in Elrod observed that "[T]he legislative history of the 1974 amendment to the ADEA lacks explicit reference to the source of congressional authority to extend the coverage of the Act to state and local governmental employees." EEOC

v. Elrod, 674 F.2d at 604. In reality, the House report concerning the 1974 FLSA amendments made reference only to the Commerce Clause, the same source of authority for both the ADEA when it was passed in 1967, and the FLSA. See, House Report No. 93-913, 1974 U.S. Code and Admin. News at 2811-12. There are two sentences in the Congressional Record from the sponsor of an amendment extending the ADEA to States and local governmental units, and no additional contemporaneous legislative history.

Not cited by the court of appeals is the rule of construction contained in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16 (1981): "Because such legislation imposes congressional policy on a State involuntarily, we should not quickly attribute to Congress an unstated intent to enforce its authority to enforce the Fourteenth Amendment." Yet, the court of appeals did not consider the extraordinary shift in the allocation of power between the States and the Federal Government that Pennhurst addressed. Rather, the court of appeals (and the Elrod case, upon which it relied) merely restated an unremarkable proposition, namely, that Congress need not necessarily specifically invoke the words "Section 5" or "Fourteenth Amendment." The cornerstone of Elrod and the court of appeals is rooted in a concept that the Justice Department has espoused: notwithstanding Pennhurst, the critical issue is whether Congress could have extended the ADEA to the States. There is no support for that proposition in this Court's Eleventh Amendment jurisprudence. There is, in the court of appeals' decision, a citation to Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980) in support of this theory. However, the theory implodes when it is analyzed.

At issue in Fullilove was a federally-mandated "minority business enterprise" (MBE) program. The intervenor and the court of appeals have seized on a portion of a sentence in that case ("Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment," 448 U.S. at 478), and attempted to fit it into the 1974 ADEA amendments. It is not a good fit. Fullilove pertained to a constitutionally suspect classification; the ADEA does not. There was a record before Congress in 1977 of a history of unequal opportunity for racial minorities in the construction industry;[6/] there was no record of age discrimination by State governments before Congress in 1974. The cases cited in Fullilove in support of its holding, Katzenbach v. Morgan, 384 U.S. 641 (1966) and Oregon v. Mitchell, 400 U.S. 112 (1990),[7/] each had a legislative record from which Congress could have adduced that literacy tests and other devices had the effect of discriminating against racial minorities in the exercise of their voting rights. Again, the record before Congress in 1974 of state-sanctioned age discrimination is non-existent.

The lack of such a record is of critical importance in analyzing City of Boerne v. Flores, 521 U.S. 507 (1997).

6/ "Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises." Fullilove, 448 U.S. at 478.

7/ Oregon was cited in Fullilove as an example of appropriate Section 5 legislation. However,the reference to Oregon was only to the nationwide literacy test ban. Other aspects of the 1970 Voting Rights Amendments were found to be improper exercises of Congress' Section 5 authority. Oregon v. Mitchell, 400 U.S. at 127.

The existence of a legislative record is not the sole determining factor in Section 5 analysis. However, in its analysis of the Religious Freedom Restoration Act (RFRA) this Court observed that the legislative hearings mentioned "no episodes [of religious persecution] occurring in the past forty years." City of Boerne, 521 U.S. at 530. The court of appeals' response was to cite cases from other circuits most of which rely on EEOC v. Elrod, supra. In that case, the Seventh Circuit found the appropriate determinants of legislative history to be the original ADEA, which was passed pursuant to the Commerce Clause in 1967, and did not apply to the States; and 1978 amendments to the ADEA, EEOC v. Elrod, 674 F.2d at 604-607. Neither of those enactments are relevant to what Congress did in 1974.

There is unmistakable tension between the decision of the court of appeals in this case and City of Boerne. Under this Court's analysis, the boundaries of a constitutional right are determined by the Supreme Court, not by Congress. City of Boerne, 521 U.S. at 529. Further, Congress' powers under Section 5 are limited. "Congress does not enforce a constitutional right by changing what the right is." City of Boerne at 519. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne 521 U.S. at 520.

The decision of the court of appeals does not take into account that in 1974, the contours of the constitutional right to be free of age discrimination had not been addressed by the Supreme Court. Two years later, this Court, in Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) adopted the rational-basis test for reviewing Equal Protection Clause-based claims of age discrimination by States. It is correct, as the various circuits have observed, that the

ADEA lacks one of the ingredients that led the courts to invalidate the RFRA. The ADEA was not a transparent, congressional effort to overturn a constitutional holding. The 1974 amendments were, however, passed in the absence of any guidance from this Court as to the scope of a constitutional right to be free of age discrimination. The definition of a constitutional right then, was made by Congress in the first instance. City of Boerne does not permit this.

This Court should now address the question that was reserved in EEOC v. Wyoming, 460 U.S. 226 (1983), and determine that the ADEA could not have been enacted pursuant to Section Five of the Fourteenth Amendment.

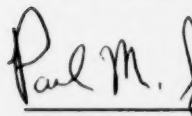
CONCLUSION

For the reasons stated herein, the Petitioners request that their petition for a writ of certiorari be granted.

Respectfully submitted,

BOARD OF TRUSTEES OF THE UNIVERSITY OF CONNECTICUT

RICHARD BLUMENTHAL
ATTORNEY GENERAL



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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1998

Argued: September 16, 1998
Decided: December 23, 1998

Docket Nos. 97-9433, -9543, -9367

RALPH A. COOPER,

Plaintiff-Appellee,

-against-

NEW YORK STATE OFFICE OF MENTAL HEALTH, BRYAN F. RUDES and RICHARD A. LALLIER,

Defendants-Appellants.

JOHN L. METE and MERRILL J. GOTTLIEB, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

-against-

NEW YORK STATE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Defendants-Appellants.

CLIFFORD DAVIS; BILLIE LEVY, Executrix of the Estate of Nathan Levy, Jr.; and ROBERT BARD,

Plaintiffs-Appellees,

-against-

BOARD OF TRUSTEES OF THE UNIVERSITY OF CONNECTICUT and THE UNIVERSITY OF CONNECTICUT,

Defendants-Appellants.

Before:

FEINBERG, KEARSE and STRAUB,

Circuit Judges.

Appeals from two orders of the United States District Court for the Northern District of New York, Scullin, J. and McCurn, J., and an order of the United States District Court for the District of Connecticut, Thompson, J., all denying defendants' motions to dismiss plaintiffs' actions under the ADEA for lack of subject matter jurisdiction because of the Eleventh Amendment.

Affirmed.

LISA LECOURS, Albany, NY, Assistant Attorney General of the State of New York (Dennis C. Vacco, Attorney General of the State of New York, Peter H. Schiff, Deputy Solicitor General, of Counsel), *for Defendants-Appellants.*

PAUL M. SHAPIRO, Storrs, CT, Assistant Attorney General for the State of Connecticut (Richard Blumenthal, Attorney General of the State of Connecticut, Gregory T. D'Auria and Bernard F. McGovern, Jr., Assistant Attorneys General, of Counsel and on the brief), *for Defendants-Appellants.*

PAULINE R. KINSELLA, Albany, NY (Hinman, Straub, Pigors & Manning, P.C., Deirdre Roney, of Counsel, for Plaintiff-Appellee Ralph A. Cooper; Law Offices of Leonard N. Flamm, New York, NY, for Plaintiffs-Appellees John L. Mete, et al.), *for Plaintiffs-Appellees.*

GEOFFREY JUDD VITT, Norwich, VT (Brooks, McNally, Platto & Vitt, P.C., Eric D. Jones, of Counsel), *for Plaintiffs-Appellees Clifford Davis, et al.*

SETH M. GALANTER, Washington, DC, Department of Justice, Civil Rights Division (Bill Lann Lee, Acting Assistant Attorney General, Jessica Dunsay Silver, of Counsel), *for United States as Intervenor.*

American Association of Retired Persons, Washington, DC (Cathy Ventrell-Monsees, Melvin Radowitz, of Counsel), *for the American Association of Retired Persons, Amicus Curiae.*

FEINBERG, Circuit Judge:

Defendants-appellants in two of these three appeals are agencies or officials of New York State and defendants-appellants in the third appeal are the University of Connecticut and its Board of Trustees. The appeals are from two orders of the United States District Court for the Northern District of New York, one by Frederick J. Scullin, Jr., J., and the other by Neal P. McCurn, J., and an order of the United States District Court for District of Connecticut, Alvin W. Thompson, J. All the orders denied defendants' motions to dismiss the complaints of the various plaintiffs-appellees. These three appeals present a single legal issue: whether federal courts have subject matter jurisdiction over claims alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1994), brought by individuals against state agencies or officials. In all three cases, the district courts found that plaintiffs' claims under the ADEA against the various defendants are not barred by the Eleventh Amendment. For reasons set forth below, we affirm.

I. Background

In November 1993, plaintiff Ralph A. Cooper, a New York state employee, brought an action in the Northern District against the New York State Office of Mental Health (OMH) and Bryan F. Rudes and Richard Lallier, two OMH employees, alleging that OMH's

decision to terminate his employment violated the ADEA.[1] In October 1991, plaintiffs John L. Mete and Merrill J. Gottlieb brought a class action in the Northern District against the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) and the New York State Department of Civil Service alleging, inter alia, that the complete elimination of the management position held by a defined class of employees, including plaintiffs, violated the ADEA. In May 1992, Clifford Davis, Nathan Levy, Jr. and Robert Bard, all faculty members of the University of Connecticut School of Law, brought an action in the United States District Court for the District of Connecticut against the Board of Trustees of the University of Connecticut and the University of Connecticut alleging that salary decisions made between 1984 and 1990 violated, inter alia, their rights under the ADEA.

In May 1997, defendant OMH moved to dismiss plaintiff Cooper's complaint pursuant to Fed. R. Civ. P. 12(b)(1),[2] arguing that the Eleventh Amendment deprived the court of subject matter jurisdiction over ADEA complaints filed against States and state agencies because state sovereign immunity was not abrogated by Congress when it extended the coverage of the ADEA to include state employees. In October 1997, Judge Scullin denied

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[1]We mention Cooper first because we follow the order of the cases in the caption.

[2]Hereafter, the Federal Rules of Civil Procedure will be referred to as Rule ___.

defendant OMH's motion.

In June 1994, defendant OMRDD moved pursuant to Rule 56 for summary judgment as to all federal causes of action alleged by plaintiffs Mete and Gottlieb. In December 1996, the district court *sua sponte* raised the issue of its jurisdiction over ADEA claims brought against New York State and its agencies. In November 1997, Judge McCurn denied OMRDD's motion as to the ADEA claims.[3]

In September 1996, the Connecticut defendants moved pursuant to Rule 12(b)(1) to dismiss the ADEA claims of plaintiffs Davis, Levy and Bard, arguing that the Eleventh Amendment deprived the district court of jurisdiction over those claims. In September 1997, Judge Thompson denied defendants' motion.

Each of these three orders was separately appealed in timely fashion. We have jurisdiction to review the challenged orders, despite their apparent lack of finality, because orders denying States' claims of Eleventh Amendment immunity fall under the collateral order doctrine, which allows immediate appellate review in certain circumstances of what would otherwise be non-final decisions. Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993). In January 1998, this Court ordered the appeals to be heard

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[3]In addition, the November 1997 Memorandum Decision and Order dismissed plaintiffs' state law claims. Dismissal of those claims is not before us.

in tandem. For the reasons that follow, we hold that the Eleventh Amendment did not deprive the district courts of jurisdiction over these ADEA claims because Congress abrogated the States' sovereign immunity through a valid exercise of its power under § 5 of the Fourteenth Amendment.

II. Discussion

A district court's legal conclusion is reviewed by this court *de novo*. See Close v. New York, 125 F.3d 31, 35 (2d Cir. 1997) (Rule 12(b)(1) motion); Frank v. Aaronson, 120 F.3d 10, 14 (2d Cir. 1997) (Rule 56 motion).

The Eleventh Amendment provides the States with a substantial grant of immunity from suit in federal court. The Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In addition to barring suits in federal court against an unconsenting State by citizens of other States, the Amendment has been interpreted to bar suits in federal court against an unconsenting State by its own citizens. Hans v. Louisiana, 134 U.S. 1, 15 (1890). However, Congress may abrogate the States' sovereign immunity if it (1) provides "a clear legislative statement" of its intent to abrogate, Seminole Tribe v. Florida, 517 U.S. 44, 55

(1996), and (2) legislates pursuant to a valid exercise of its enforcement power under § 5 of the Fourteenth Amendment. Id. at 59.

In 1974, as more fully set forth below, Congress extended coverage of the ADEA to include state employees. We join the majority of our sister circuits in concluding that Congress satisfied both prongs of the *Seminole Tribe* test in enacting the 1974 amendments to the ADEA. See Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Coger v. Board of Regents, 154 F.3d 296 (6th Cir. 1998); Scott v. University of Mississippi, 148 F.3d 493 (5th Cir. 1998); Keeton v. University of Nevada Sys., 150 F.3d 1055 (9th Cir. 1998); Goshtasby v. Board of Trustees, 141 F.3d 761 (7th Cir. 1998). But see Humenansky v. Regents of the Univ. of Minnesota, 152 F.3d 822 (8th Cir. 1998) (holding that the ADEA does not satisfy either prong of the test); Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) (finding that ADEA lacks unmistakable expression by Congress of intent to abrogate; not reaching whether it had power to abrogate). The Eleventh Amendment issue has generated numerous opinions in the other circuits. Under all the circumstances, we will note our agreement with the other circuits on various issues and respond at greater length to the arguments of appellants only where we think it appropriate to do so.[4]

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[4]While the briefs submitted by the appellants differ slightly, we will refer to appellants' arguments without identifying whether one or both States took each position.

A. Intent to Abrogate

The appeals before us stem in part from the Supreme Court's decision in Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279 (1973). In *Employees,* the Court considered whether in enacting the Fair Labor Standards Act (FLSA) Congress had abrogated the States' immunity under the Eleventh Amendment. The Court focused on the language of the FLSA's enforcement section, 29 U.S.C. § 216(b), and concluded that the FLSA did not abrogate state sovereign immunity because Congress did not express such an intent by "clear language." Id. at 285.[5] In response to *Employees,* in 1974 Congress amended § 216(b), changing "in any court of competent jurisdiction" to "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." FLSA Amendments of 1974, Pub. L. 93-259, sec. 6(d)(1), 88 Stat. 55, 61 (amending 29

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[5]At that time, § 216(b) read as follows in relevant part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected . . . . Action to recover such liability may be maintained *in any court of competent jurisdiction* by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. (emphasis supplied)

U.S.C. § 216(b)).[6]

In the same legislative package that amended the FLSA in response to *Employees,* Congress also included amendments that expanded the scope of the ADEA. See id. sec. 28. When the ADEA was originally enacted in 1967, it applied only to private employers. See EEOC v. Elrod, 674 F.2d 601, 604 (7th Cir. 1982). The 1974 amendments extended the scope of the ADEA by adding the States and their agencies to the definition of "employer," FLSA Amendments of 1974, sec. 28(a)(2), 88 Stat. at 74 (amending 29 U.S.C. § 630(b)(2)), and by adding "employees subject to the civil service laws of a State government" to the definition of "employee," id. sec.

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[6]After amendment, the section provided in relevant part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected . . . . An action to recover the liability . . . may be maintained *against any employer (including a public agency) in any Federal or State court of competent jurisdiction* by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. (emphasis supplied)

In addition, "public agency" is defined in 29 U.S.C. § 203(x) as including "the government of a State or political subdivision thereof . . . a State, or a political subdivision of a State."

28(a)(4) (amending § 630(f)). However, the 1974 amendments did not alter the ADEA *enforcement* section, 29 U.S.C. § 626(c).[7]

The language of unaltered § 626(c) forms the crux of appellants' argument that Congress, in enacting the 1974 ADEA amendments, did not express an unequivocal intent to abrogate the State's immunity from suit in federal court. Appellants point out that § 626(c), which authorizes aggrieved persons to bring their actions "in any court of competent jurisdiction," contains exactly the same enforcement language, see note 5 supra, that the Supreme Court in *Employees* held did not evidence a clear intent to abrogate state sovereign immunity. Employees, 411 U.S. at 284-86. Appellants further argue that Congress's failure in 1974 to amend the ADEA enforcement provision to refer explicitly to the States, when it had the opportunity to do so *and* the knowledge (based on *Employees)* that the then-current enforcement language was insufficient is particularly significant. Appellants acknowledge that the addition of States to the definition of "employer" *could be* interpreted as an intent to abrogate the Eleventh Amendment, but stress that we still must find an "unmistakably clear" statement of intent, Dellmuth v. Muth, 491 U.S. 223, 228 (1989) for the States' immunity

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[7]Section 626(c) provides, in relevant part:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

to be deemed abrogated. See also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). Appellants contend that this threshold has not been met.

We disagree. In reaching this conclusion, we join the majority of the other circuits that have considered the question. See, e.g., Goshtasby, 141 F.3d at 766 (" 'Unless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases-and that degree of explicitness is not required . . . -it could not have made its desire to override the states' sovereign immunity clearer.' ") (quoting Davidson v. Board of Governors, 920 F.2d 441, 443 (7th Cir. 1990)); Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 695 (3rd Cir. 1996) ("The [ADEA] simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants when sued under the ADEA for their actions as 'employers.' "); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 701 (1st Cir. 1993) ("[T]he ADEA's express authorization for the maintenance of suits against state employers comprises adequate evidence to demonstrate the congressional will that Eleventh Amendment immunity be abrogated.").

It is true, as appellants emphasize, that the ADEA's enforcement language is identical to that found insufficient to abrogate immunity under the FLSA in *Employees*. Nevertheless, we think that the ADEA is "unmistakably clear" in its intent to abrogate, thus distinguishing it from the statutes considered by the Court in *Employees* and its progeny. For example, the version of the FLSA under consideration in *Employees* defined "employers" to *exclude* "any State or political subdivision of a state" except for

certain state-run hospitals and schools. 411 U.S. at 282-83. Given congressional hesitancy to subject the States to the substantive provisions of the FLSA, the Court concluded that it could not be assumed that Congress intended to subject the States to the enforcement sections of the FLSA without explicit guidance in the text of the statute. Id. at 285 ("It is not easy to infer that Congress . . . desired silently to deprive the States of an immunity . . . .").

The legislation under consideration in *Atascadero* and *Dellmuth* suffered from similar defects. In *Atascadero,* the only evidence of abrogation was the section of the Rehabilitation Act that provides remedies for violations of that Act "by any recipient of Federal assistance." 29 U.S.C. § 794(a). Since the States are recipients of federal funding under the statute, they technically fall within the group authorized to be sued under that section. However, the statute nowhere specifically identifies the States as the type of "recipient" intended to be subject to suit. In light of the paucity of statutory evidence of intent, the Court explained that "[a] general authorization for suit in federal court is not . . . sufficient to abrogate the Eleventh Amendment." Atascadero, 473 U.S. at 246.

In *Dellmuth,* the Court concluded that the Education of the Handicapped Act (EHA) did not contain sufficiently explicit language to overcome the presumption against abrogation of immunity. However, the principal textual argument in that case for abrogation was based only upon a-"general authorization" for judicial review of administrative decisions in § 1415(e)(2) of the EHA and upon what the Court characterized as "frequent" references

to the States in the statute. 491 U.S. at 231-32. Without an explicit creation of a private right of action for damages, the Court concluded that it could not be said with sufficient certainty that Congress had intended to allow private damage actions against the States in abrogation of their sovereign immunity. Id.

The amended ADEA is quite different from the statutes involved in those cases. Unlike the situation in *Employees,* the ADEA does not explicitly exclude most state employees from coverage. Instead, the ADEA explicitly *includes* the States and their employees within its scope by naming the States-without any limitation-in the definition of "employer," 29 U.S.C. § 630(b), and naming state employees within the definition of "employee," id. § 630(f). Nor, as in the statute at issue in *Atascadero,* are the States subject to liability only by implication. Instead, because the States are *explicitly* named as an "employer," they fall within the core group of potential defendants in ADEA actions. Finally, unlike the situation in *Dellmuth,* the judicial review provisions of the statute are not limited to appellate review of state administrative decisions. Instead, the ADEA has a private enforcement section that allows aggrieved persons to sue for damages, such as back pay. See 29 U.S.C. § 626(c). While it is true that § 626(c) is phrased in general terms-"any person aggrieved" may sue in "any court of competent jurisdiction"-the combination of the amendments to "employer" and "employee" and the availability of private damage actions makes it clear that States are intended to be subject to liability under § 626(c). The fact that the States are not named again in the enforcement section does not make ambiguous otherwise clear statements of intent to

abrogate. Indeed, § 626(c) does not use the term "employer" at all; by this omission, should we conclude that Congress did not state clearly its intent to subject any employer, public or private, to the enforcement provision of the Act? Surely such a conclusion would be an absurdity.[8]

Nothing in the ADEA or the cases cited by appellants suggests that § 626(c) is to be read in a vacuum, requiring a restatement of congressional intent to apply the ADEA to the States. See Seminole, 517 U.S. at 56-57 (looking to references to the States in numerous sections of the statute in finding clear statement of intent to abrogate). The language of the FLSA enforcement provision was found insufficient to abrogate in light of the statute as a whole; the hesitancy of Congress to subject the States to the FLSA led to doubt as to whether Congress intended to subject the States to the enforcement powers of the federal courts. The ADEA as a whole, however, offers no evidence of hesitancy on the part of Congress.[9] In light of

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[8]In fact, the States *admit* that they are subject to the private enforcement section of the ADEA and thus can be ordered by state courts to pay damages to individuals. They dispute only whether a federal court has jurisdiction to hear ADEA cases and award such damages.

[9]In fact, the AARP as amici point out that Congress has named the States as "employers" on five separate occasions (in amendments to the ADEA in 1974, 1986, 1990, 1991 and 1996), expressing a clear intent to subject the States to liability under the Act in a private suit in

the explicit statements that States fall within the Act's purview, Congress was "unmistakably clear" in expressing its intent to abrogate state sovereign immunity. Cf. Dellmuth, 491 U.S. at 233 (Scalia, J., concurring) (pointing out that by clearly subjecting States to suit for monetary damages, Congress could abrogate sovereign immunity "without explicit[ly] referr[ing] to state sovereign immunity or the Eleventh Amendment.")

Finally, we note that we are equally unpersuaded by appellants' argument that the cross-reference between the FLSA enforcement provisions and the ADEA enforcement provisions creates ambiguity as to Congress's intent to abrogate state sovereign immunity. See 29 U.S.C. § 626(b) (cross-referencing § 216).[10] We have

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federal court.

[10]Section 626(b) of the ADEA provides, in relevant part, as follows:

> The provisions of this chapter [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in section[ ] 216 . . . of this title [29 U.S.C.] . . . .
>
> Section 216(b) of the FLSA now provides, in relevant part, as follows:
>
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected . . . . An action to

already found that Congress provided a "clear legislative statement," Seminole, 517 U.S. at 55, of its intent to abrogate. The cross-reference to the FLSA enforcement provision that states that an action "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction," 29 U.S.C. § 216(b) further supports that finding. See generally, Scott, 148 F.3d at 500. We believe that this cross-reference to § 216(b) makes clear Congress's intent to subject the States to suit in federal court. See, e.g., id. at 500 & n.7; Hurd v. Pittsburgh State University, 109 F.3d 1540, 1544 n.3 (10th Cir. 1997) ("[T]he enforcement provisions which the ADEA *now* references specifically authorize ADEA suits in federal court.").

B. Section 5 Authority

Appellants also argue that even if Congress intended to abrogate state sovereign immunity, it did not have the power to do so because the ADEA was not enacted pursuant to § 5 of the Fourteenth Amendment. Alternatively, appellants contend that even if Congress enacted the ADEA pursuant to § 5, Congress exceeded its § 5 authority as defined by the Supreme Court in City of Boerne v. Flores, __ U.S. __, 117 S.Ct. 2157 (1997).

> recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction . . .

Although this circuit has never ruled directly on this issue, in dictum we have listed the ADEA as an example of a statute enacted pursuant to § 5 of the Fourteenth Amendment. Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 31 (2d Cir. 1991). We agree with the overwhelming weight of authority holding that the ADEA was adopted pursuant to § 5 of the Fourteenth Amendment. See, e.g., Coger, 154 F.3d at 304-05 (6th Cir.); Scott, 148 F.3d at 500-03; Keeton, 150 F.3d at 1057-58 (9th Cir.); Goshtasby, 141 F.3d at 768 (7th Cir.); Hurd v. Pittsburgh State Univ., 109 F.3d 1540, 1544-46 (10th Cir. 1997); Blanciak, 77 F.3d at 695 (3rd Cir.); Ramirez, 715 F.2d at 700 (1st Cir.).

Appellants make a number of arguments that require only brief response. They point out that the ADEA does not contain any reference to § 5 of the Fourteenth Amendment in the body of the statute or in the legislative history of the original act or the 1974 amendments. However, the failure of Congress to use the words "section 5" or "Fourteenth Amendment" or "equal protection" is not controlling. EEOC v. Wyoming, 460 U.S. 226, 243 n. 18 (1983). As long as Congress could have enacted the ADEA pursuant to § 5, Congress need not have declared its source of power. Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980); EEOC v. Elrod, 674 F.2d 601, 608-09 (7th Cir. 1982).

Appellants also argue that even if Congress intended to act pursuant to § 5 in enacting the 1974 amendments, it lacked the power to do so because the statute involves neither a fundamental right nor a suspect

classification. We agree with those courts that have held that Congress has the power to prohibit arbitrary age-based discrimination even though age is not a suspect classification and no fundamental right is involved. See, e.g., Scott, 148 F.3d at 501; Goshtasby, 141 F.3d at 770 ("The fact that age is not a suspect classification does not foreclose Congress from enforcing the Equal Protection Clause through an enactment protecting against arbitrary and invidious age discrimination.").

Finally, appellants argue that the ADEA is substantive, rather than remedial, legislation and as such exceeds Congress's power to legislate according to the standards articulated in *City of Boerne*. In order to qualify as remedial legislation under those standards, "[t]here must be a congruence and proportionality between the injury prevented or remedied and the means adopted to that end." 117 S. Ct. at 2164. We agree with the majority of our sister circuits that have considered this issue and hold that the ADEA is sufficiently limited in scope to pass the *City of Boerne* test. See Migneault, 158 F.3d at 1136-39 (10th Cir.); Coger, 154 F.3d at 305-07 (6th Cir.); Scott, 148 F.3d at 501-03 (5th Cir.); Goshtasby, 141 F.3d at 771-72 (7th Cir.); contra Humenansky, 152 F.3d at 827-28 (finding that scope of ADEA exceeds congressional authority and citing Chief Justice Burger's dissent in EEOC v. Wyoming, 460 U.S. at 262-63).

Conclusion

We have considered all of appellants' contentions and find them to be without merit. The orders of the district courts are affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CLIFFORD DAVIS,	:	
Plaintiff,	:	
	:	
V.	:	Civil Action No.
	:	2:92cv370 (AWT)
BOARD OF TRUSTEES OF THE	:	"ALL CASES"
UNIVERSITY OF CONNECTICUT:		
and the UNIVERSITY OF	:	
CONNECTICUT,	:	
Defendants.	:	

RULING ON MOTION TO DISMISS

I. Background

The plaintiffs[1] bring this action against the defendants alleging that the University of Connecticut, as an agency of the state of Connecticut, discriminatorily discharged the plaintiffs in violation of the Age

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[1]The above-captioned matter is the lead case among three consolidated cases, including Nathan Levy, Jr. v. Board of Trustees of the Univ. of Connecticut, et al., Docket No. 2:92cv371 (AWT) and Robert L. Bard v. Board of Trustees of the University of Connecticut, et al., Docket No. 2:92cv372 (AWT). The defendants' motion to dismiss was filed as to all three of the consolidated cases. Accordingly, the instant ruling applies to all three of the consolidated cases.

Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA").[2] The defendants move to dismiss Count I of the Complaint (setting forth the plaintiffs, ADEA claim) for lack of subject matter jurisdiction.

For the reasons set forth below, the defendants' motion should be denied.

II. Discussion

When considering a motion to dismiss on the ground of lack of subject matter jurisdiction, the court is required to accept as true all factual allegations in the complaint and draw inferences from such allegations in the light most favorable to the plaintiffs. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "[A] complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing

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[2]On September 30, 1996, this court accepted and adopted the magistrate judge's finding, inter alia, that the University of Connecticut is an arm of the state of Connecticut. See recommended ruling on motion for summary judgment [doc. # 76] and endorsement order [doc. #79].

Scheuer, 416 U.S. at 232).

A party may move to dismiss an action because of a failure of subject matter jurisdiction at any time during the course of an action. Fed. R. Civ. P. 12 (b) (1) ; see John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 588 F.2d 24, 26 (2d Cir.), cert. denied, 440 U.S. 960 (1978). Once challenged, the burden of establishing a federal court's jurisdiction rests on the party asserting subject matter jurisdiction. Commonwealth Land Title Ins. Co. v. United States of America, 759 F. Supp. 87, 90 (D. Conn. 1991). Dismissals for lack of subject matter jurisdiction are not on the merits and therefore not accorded res judicata effect. Exchange Nat'l Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976), cert. denied, 469 U.S. 884 (1984).

In their motion, the defendants argue that the Eleventh Amendment to the United States Constitution deprives this court of subject matter jurisdiction over claims arising under ADEA against a state, or arms of a state. Accordingly, the pivotal issue here is whether the University of Connecticut, as an arm of the state of Connecticut, is entitled to Eleventh Amendment immunity from suit in federal court. The court concludes that the University of Connecticut is not entitled to such immunity and that the plaintiffs' ADEA claim is not barred by the Eleventh Amendment.

The Eleventh Amendment bars private suits in federal courts against the states and state agencies "seeking to impose liability which must be paid from public funds in the treasury." Edelman v. Jordan, 415 U.S. 651, 663

(1974). However, Eleventh Amendment immunity may be abrogated where Congress indicates an "unequivocal expression of congressional intent" to do so and authorizes such suits pursuant to section five of the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Thus, the questions here are: (i) whether the 1974 amendment to ADEA was enacted pursuant to section five of the Fourteenth Amendment, and (ii) if so, whether Congress intended that ADEA abrogate Eleventh Amendment sovereign immunity. It is clear, and the parties do not dispute, that the latter question should be answered in the affirmative.[3] The former question is the

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[3]ADEA defines "employer" to include "a State or political subdivision of a State or any agency or instrumentality of a State." 29 U.S.C. § 630(b) (2). An "employer" who violates the ADEA is liable for legal and equitable relief. 29 U.S.C. § 626(b) and (c). Congress does not need to explicitly state that it intended to abrogate the states' Eleventh Amendment immunity in order for the court to find that such intent was present. See Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980). However, "[i]f the Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). Congress has made its intention to abrogate the states' Eleventh Amendment immunity unmistakably clear by providing that states which violate ADEA are liable for legal and equitable relief. See Grossman v. Suffolk County Dist. Attorney's Office, 777 F. Supp. 1101, 1104 (E.D.N.Y. 1991) (citing Davidson v.

dispositive issue in this case.

In EEOC v. Wyoming, the Supreme Court did not reach the issue of whether ADEA was enacted pursuant to section five of the Fourteenth Amendment since it found that ADEA was a "valid exercise of Congress' powers under the Commerce Clause." 460 U.S. 226, 243 (1983). Nor has the Second Circuit addressed this issue. Several other circuits have, however, addressed this issue, and concluded that ADEA as amended in 1974, was enacted pursuant to Congress' powers under section five of the Fourteenth Amendment.[4] This court agrees.

In several respects, the legislative history of ADEA demonstrates that ADEA is a civil rights law that enforces the Fourteenth Amendment guarantee of equal protection. First, ADEA was drafted and proposed in a manner nearly identical to that of Title VII, which was clearly enacted under section five of the Fourteenth Amendment. See Arritt v. Grisell, 567 F.2d 1267, 1269-70 & nn.11-12 (4th Cir. 1977); EEOC v. Elrod, 674 F.2d 601, 607 (7th Cir. 1982); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694,

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Board of Governors of State Colleges & Univs., 920 F.2d 441, 443 (7th Cir. 1990)). This court concludes that ADEA's express authorization for the maintenance of suits against state employers adequately demonstrates congressional intent that the states' Eleventh Amendment immunity be abrogated in suits brought under ADEA.

[4]See infra note 5.

700 (1st Cir. 1983). Second, the congressional purpose underlying ADEA was to prevent arbitrary age discrimination and "to shield public employees from the invidious effects of age-based discrimination." Ramirez, 715 F.2d at 699. "[T]his proscription of vagarious sovereign conduct is of a genre which, by any logical standard, falls well within the category of appropriate legislation, under section five of the Fourteenth Amendment." Id.; Elrod, 674 F.2d at 604; Arritt, 567 F.2d at 1270-71. Third, the legislative history reveals that Congress viewed ADEA as filling a gap in the federal civil rights laws. See Elrod, 674 F.2d at 605-07 & n.3 (and legislative history cited therein). ADEA was, therefore, "inextricably tied to overall federal policy in insuring equal employment opportunity." Id.

Furthermore, the 1974 amendment to ADEA extended its application from private sector employees to federal, state and local government employees as well. Fair Labor Standards Amendments of 1974, Pub.L.No. 93-259, § 28, 88 Stat. 74 (amending 29 U.S.C. § 630). The legislative history, though not explicit, indicates "a congressional purpose to prevent arbitrary age discrimination within the protected age group by extending the coverage of the Act to state and local governments." Elrod, 674 F.2d at 605. That prohibition, as Elrod notes, "is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment Id. at 604. Congress does not have to recite the talismanic words "Section 5", "Fourteenth Amendment", or "Equal Protection", in order for a statute to be based on it. EEOC v. Wyoming, 460 U.S. at 244, n.18.

The Seventh Circuit evaluated the purposes and legislative history of the 1974 amendment in some detail and determined that it was enacted under the authority of section five of the Fourteenth Amendment. Elrod, 674 F.2d at 603-10. This court agrees with the reasoning in Elrod. Moreover, virtually all of the reported decisions from other courts which have addressed this question have likewise found that the 1974 amendment to ADEA was enacted by Congress pursuant to its section five powers.[5]

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[5]See, e.g., Hurd v. Pittsburg State Univ., 29 F.3d 564, 565 (10th Cir. 1993), cert. denied, 513 U.S. 930, 115 S. Ct. 321 (1994); Ramirez, 715 F.2d at 700; Elrod, 674 F.2d at 603-10; Arritt, 567 F.2d at 1271; Pietraszeski v. Buffalo State College, Docket No. 97-CV-0129E, 1997 WL 436763, at *1 (W.D.N.Y. Aug. 1, 1997); Griswold v. Alabama Dep't of Indus. Relations, 903 F. Supp. 1492, 1496 (M.D. Ala. 1995); Swanson v. Dept. of Health, State of Colorado, 773 F. Supp. 255, 257 (D. Colo. 1991); EEOC v. KDM School Bus Co., 612 F. Supp. 369, 372 (S.D.N.Y. 1985); Barrett v. Suffolk Transp. Servs., Inc., 600 F. Supp. 81 (E.D.N.Y. 1984).

See also Davidson, 920 F.2d at 443; Sheerin v. New York State Div. of Substance Abuse Serv., 844 F. Supp. 909, 918 (N.D.N.Y. 1994); Grossman, 777 F. Supp. at 1103-04; Carpenter v. Pennsylvania Liquor Control Bd., 508 F. Supp. 148, 149 (E.D. Pa. 1981); EEOC v. Pennsylvania Liquor Control Bd., 503 F. Supp. 1051, 1053 (M.D. Pa. 1980); Marshall v. Delaware River and Bay Authority, 471 F. Supp. 886, 891 n.7 (D.Del. 1979); Remmick v. Barnes County, 435 F. Supp. 914, 916

To support their Eleventh Amendment sovereign immunity argument, the defendants rely primarily on Seminole Tribe of Florida v. Florida, __ U.S. __, 116 S. Ct. 1114, 1122 (1996). There the Court held that Congress could not constitutionally subject a state to suit in federal court when it acts under its Commerce Clause powers. See id. at 1122. However, the Court also reaffirmed Congress' power to abrogate state immunity from suit in federal court by enacting legislation pursuant to section five of the Fourteenth Amendment. See id. at 1128 (citing Fitzpatrick, 427 U.S. at 452-56). The defendants argue that ADEA was enacted exclusively under the Commerce Clause and, consequently, that Seminole Tribe bars ADEA claims against the states in federal court. This court does not find the defendants' argument persuasive. For the reasons set forth above, the court concludes that the 1974 amendment to ADEA was enacted pursuant to Congress' powers under section five of the Fourteenth Amendment.

II. Conclusion

Accordingly, the defendants' Motion to Dismiss Count One for a Lack of Subject Matter Jurisdiction [doc. #80] is hereby DENIED.

It is so ordered.

(D.N.D. 1977); Aaron v. Davis, 424 F. Supp. 1238, 1241 & n.2 (E.D. Ark. 1976); Usery v. Bd. of Educ. of Salt Lake City, 421 F. Supp. 718, 721 (D. Utah 1976).

Dated in Hartford, Connecticut on this 30th day of September, 1997.

s/ Alvin W. Thompson
Alvin W. Thompson
United States District Judge

STATUTES INVOLVED

Sections 626(b) and (c) of the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. § 621, *et seq.*) provide as follows:

§ 626. Recordkeeping, investigation, and enforcement

* * *

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to

be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

* * *

Sections 630(b) and (f) of the ADEA provide as follows

§ 630. Definitions.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working

day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

Section 216(b) of the Fair Labor Standards Act of 1938 provides:

§ 216. Penalties.

* * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to

any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

* * *

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(2)

No. 98-1524

In the Supreme Court of the United States

OCTOBER TERM, 1998

BOARD OF TRUSTEES OF THE UNIVERSITY OF CONNECTICUT, ET AL., PETITIONERS

v.

CLIFFORD DAVIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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6PP

QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 162 F.3d 770. The opinion of the district court (Pet. App. A20-A28) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 23, 1998. The petition for a writ of certiorari was filed on March 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).* The ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced

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* The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. III 1997). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a) (1994 & Supp. III 1997); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. III 1997). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) and (b)(2) (Supp. III 1997). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum hiring ages and mandatory retirement ages, in both federal and state government employment. See, *e.g.*, 5 U.S.C. 3307, 8335 (federal); 29 U.S.C. 623(j) (Supp. III 1997) (state).

in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 * * *, and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

2. Respondents were faculty members employed by the University of Connecticut School of Law. Pet. App. A5. Respondents filed suit in federal district court alleging, *inter alia*, that petitioners had begun discriminating on the basis of age in granting salary increases, in violation of the ADEA. *Ibid.* Petitioners moved to dismiss on the ground of Eleventh Amendment immunity. *Id.* at A6, A21. The district court denied the motion to dismiss. *Id.* at A23-A27.

3. Petitioners took an interlocutory appeal as of right of the denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. The court of appeals consolidated the appeal with two others raising the same issue and affirmed. Pet. App. A1-A9.

The court first "join[ed] the majority of the other circuits that have considered the question" (Pet. App. A12) in holding that Congress clearly expressed its intent to abrogate Eleventh Amendment immunity in "[t]he ADEA as a whole" (*id.* at A15). The court explained that "the combination of the amendments to 'employer' and 'employee'" in 1974, which explicitly expanded the ADEA's coverage to include the States and their employees (*id.* at A14); "the availability of private damage actions [that] makes it clear that States are intended to be subject to liability" (*ibid.*); and the

ADEA's incorporation of the FLSA enforcement provision that specifically authorizes suits against "a public agency" (*id.* at A17), made "unmistakably clear" (*id.* at A16) Congress's intent to abrogate Eleventh Amendment immunity.

The court of appeals also "agree[d] with the overwhelming weight of authority holding that the ADEA was adopted pursuant to § 5 of the Fourteenth Amendment" (Pet. App. A18) and that the statute "is sufficiently limited in scope to pass the *City of Boerne* [v. *Flores*, 521 U.S. 507 (1997)] test," which requires that Section 5 legislation reflect a congruence and proportionality between the injury prevented and the means adopted (*id.* at A19).

ARGUMENT

On January 25, 1999, this Court granted review in *United States* v. *Florida Board of Regents*, cert. granted, 119 S. Ct. 902 (1999) (No. 98-796), and *Kimel* v. *Florida Board of Regents*, cert. granted, 119 S. Ct. 901 (1999) (No. 98-791). As petitioner acknowledges (Pet. 9 n.5), the questions of abrogation of Eleventh Amendment immunity under the ADEA raised by this petition are identical to those presented in No. 98-796 and No. 98-791. Accordingly, this petition should be held pending the Court's decision in those consolidated cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791, and disposed of in accordance with the decision in those cases.

Respectfully submitted.

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No. 98-1524

In The

Supreme Court of the United States

BOARD OF TRUSTEES OF THE UNIVERSITY OF CONNECTICUT, ET AL.,

Petitioners,

v.

CLIFFORD DAVIS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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OPINIONS BELOW

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JURISDICTION

The court of appeals entered its judgment on December 23, 1998. The petition for a writ of certiorari was filed on March 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, the Board of Trustees of the University of Connecticut, and the University of Connecticut (collectively "the University") ask this Court to review the decision of the Second Circuit Court of Appeals holding that Congress clearly and constitutionally abrogated the States' Eleventh Amendment immunity when it amended the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. ("ADEA") to apply to the states. For nearly four years, the University did not question that state employees who were victims of age discrimination could invoke the protection of the federal courts. The University now contends that this understanding was called into question by two rulings of this Court: *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *City of Boerne v. Flores*, 521 U.S. 507 (1997). Those cases, however, do not substantially alter the analysis supporting the

conclusion that, in amending the ADEA to apply to the States, Congress properly and clearly abrogated the States' immunity from suit by individuals. Six circuit courts of appeals agree. Despite the University's current position, it is well established among the great majority of circuit courts of appeals, even after *Seminole Tribe* and *Boerne*, that the ADEA properly abrogates sovereign state immunity. Moreover, the validity of abrogation under the ADEA is firmly supported by the principles of law announced by this Court, and review is unnecessary. Accordingly, the University's Petition should be denied.

The ADEA renders it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).[1] The ADEA authorizes

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[1] The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. III 1997). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a) (1994 & Supp. III 1997); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. III 1997). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) and (b)(2) (Supp. III 1997). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum

individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 et seq. See 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 * * * , and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

Respondents were faculty members employed by the University. Pet.App. A5. Respondents filed suit in federal district court in 1992 alleging, *inter alia*, that the University discriminated on the basis of age in granting salary increases, in violation of the ADEA. *Ibid.* The University moved to dismiss on the ground of Eleventh Amendment immunity. *Id.* at A6, A21. The district court denied the motion to dismiss. *Id.* at A23-A27.

The University took an interlocutory appeal as of right of the denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. The court

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hiring ages and mandatory retirement ages, in both federal and state government employment. See, e.g., 5 U.S.C. 3307, 8335 (federal); 29 U.S.C. 623(j) (Supp. III 1997) (state).

of appeals consolidated the appeal with two others raising the same issue and affirmed. Pet.App. A1-A9.

The court first "join[ed] the majority of the other circuits that have considered the question" (Pet.App. A12) in holding that Congress clearly expressed its intent to abrogate Eleventh Amendment immunity in "[t]he ADEA as a whole" (*id.* at A15). The court explained that "the combination of the amendments to 'employer' and 'employee' " in 1974, which explicitly expanded the ADEA's coverage to include the States and their employees (*id.* at A14); "the availability of private damage actions [that] makes it clear that States are intended to be subject to liability" (*ibid.*); and the ADEA's incorporation of the FLSA enforcement provision that specifically authorizes suits against "a public agency" (*id.* at A17), made "unmistakably clear" (*id.* at A16) Congress's intent to abrogate Eleventh Amendment immunity.

The court of appeals also "agree[d] with the overwhelming weight of authority holding that the ADEA was adopted pursuant to Section 5 of the Fourteenth Amendment" (Pet.App. A18) and that the statute "is sufficiently limited in scope to pass the *City of Boerne* [*v. Flores*, 521 U.S. 507 (1997)] test," which requires that Section 5 legislation reflect a congruence and proportionality between the injury prevented and the means adopted (*id.* at A19).

ARGUMENT

When it argued its motion to dismiss in the district court, the University did not dispute that Congress

clearly intended to abrogate the States' immunity from suit when it amended the ADEA. Pet.App. A23 ("the parties do not dispute" that "Congress intended that ADEA abrogate Eleventh Amendment sovereign immunity"). Thus, one issue the University now claims is so compelling that it warrants Supreme Court review is an issue it did not even bother to raise when it first challenged the court's jurisdiction.

The other issue the University seeks to raise, whether Congress properly exercised its authority under the Fourteenth Amendment when it applied the ADEA to the States, is also an issue the University raised for the first time on appeal. Its position in the district court was that the ADEA was passed exclusively pursuant to the Commerce Clause; the University never questioned whether the ADEA was a valid exercise of Fourteenth Amendment power because it never acknowledged that the statute was actually enacted under the Fourteenth Amendment. Nevertheless, the University now challenges the Second Circuit's agreement with the vast majority of the other circuits that hold the ADEA is a valid exercise of Congress' Fourteenth Amendment power.

The University's Petition for a Writ of Certiorari should be denied. First, there is no compelling conflict between the decision of the Second Circuit Court of Appeals and a decision of another circuit court of appeals. Second, the decision of the Second Circuit stands on well established principles which should not be disturbed.

I. There Is No Compelling Conflict Among The Circuits

A petition for a writ of certiorari will be granted "only for compelling reasons." S.Ct. R. 10. The University has not shown a compelling reason for the Court to exercise its certiorari jurisdiction.

As the University concedes, the decision of the Second Circuit is entirely consistent with the decisions of five other circuit courts of appeals. *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); *Coger v. Board of Regents*, 154 F.3d 296 (6th Cir. 1998); *Scott v. University of Mississippi*, 148 F.3d 493 (5th Cir. 1998); *Keeton v. University of Nevada Sys.*, 150 F.3d 1055 (9th Cir. 1998); *Goshtasby v. Board of Trustees*, 141 F.3d 761 (7th Cir. 1998); see Pet. 5. Like the Second Circuit decision below, each of these five decisions reflects the unanimous and well reasoned decision of the panel.

By contrast, the two cases the University claims create a conflict are sharply divided decisions that reflect neither a uniform nor reliable analysis. *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822 (8th Cir. 1998), was a two to one decision in which the majority concluded that the ADEA did not reflect an adequately clear congressional intent to abrogate. In dictum, the majority opined that even if intent to abrogate were clear, such abrogation would be unconstitutional. The dissent would have joined the other circuit courts of appeals that found a valid abrogation of Eleventh Amendment immunity. Similarly, *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), produced three

different opinions. One panel member, Judge Edmondson, found inadequate congressional intent to abrogate; another panel member, Judge Cox, found clear intent to abrogate, but concluded Congress lacked Congressional authority to do so; the third panel member, Judge Hatchett, would hold that the ADEA reflects a valid abrogation of state sovereign immunity.

To the degree *Kimel* and *Humenansky* raise issues that require clarification, this Court will have that opportunity because *Kimel* is currently pending before the Court. *Kimel v. Florida Board of Regents*, cert. granted, 119 S.Ct. 901 (1999) (No. 98-796). Moreover, those cased do not present a sufficiently compelling conflict to justify certiorari jurisdiction in this case. On the issue of whether Congress constitutionally extended the ADEA to apply to the States, no majority decision that is binding in any circuit conflicts with the decision of the Second Circuit Court of Appeals. Only one judge in *Kimel* supports the University's position, and the two judges in *Humenansky* who would agree stated their position in dictum. On the issue of whether Congress clearly abrogated state immunity, the issue the University conceded in the district court, only the divided *Humenansky* decision supports the University. In light of the clear and consistent holdings of six circuit courts of appeal, the University has not demonstrated such a compelling conflict on an important matter to justify review on a writ of certiorari.

II. THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY CONCLUDED THAT CONGRESS CLEARLY AND PROPERLY ABROGATED THE STATES' SOVEREIGN IMMUNITY WHEN IT EXTENDED THE ADEA TO THE STATES

The University argues that Congress failed to express adequately its intent to abrogate the States' sovereign immunity when it extended the ADEA to apply to the states. Despite numerous references to the "State" in the text of the ADEA, despite a definition of an employer as including a "state", and despite an enforcement provision that expressly authorizes suit in "any Federal" court, the University maintains that the ADEA is at best an ambiguous expression of Congressional intent to subject the States to suit in federal court for violations of the statute. However, in *Seminole Tribe*, the case that the University argued cast doubt on the validity of the district court's jurisdiction in this action, this Court held "we agree with the parties, with the Eleventh Circuit in the decision below, . . . and with virtually every other court that has confronted the question" that textual references to the state as an appropriate defendant "make it indubitable that Congress intended . . . to abrogate the states' sovereign immunity from suit." *Seminole Tribe*, 116 S.Ct. at 1124.[2] There is simply "no reason to question . . . that Congress intended to abrogate state sovereign immunity by enacting the 1974 Amendments to the ADEA." *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1544 (10th Cir. 1997),

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[2] For a detailed discussion of the specific provisions of the ADEA that make reference to the "State," and authorize suits in federal court, *see* Pet.App. A14-A17.

and n.4 ("Since the 1974 Amendments to the ADEA . . . the Supreme Court and other [appeallate] courts have uniformly held that congress expressly intended to abrogate state sovereign immunity and subject states to suit under the ADEA" (citations omitted)). As the Seventh Circuit Court of Appeals has stated, " 'unless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases – and that degree of explicitness is not required . . . – it could not have made its desire to override the states' sovereign immunity clearer.' " *Goshtasby v. Board of Trustees*, 141 F.3d 761, 766 (7th Cir. 1998) (quoting *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990)).

The University also argues that abrogation through the ADEA would be an unconstitutional exercise of Congress' authority to enforce Section 5 of the Fourteenth Amendment. In support of its argument, the University relies on *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). *City of Boerne*, however, reaffirmed that "Section 5 is a positive grant of legislative power to Congress." 117 S.Ct. at 2163. Under its Section 5 power, Congress may provide remedies for violations of the substantive provisions of the Fourteenth Amendment, including the Equal Protection Clause. *See United States v. Price*, 383 U.S. 787, 789 (1966), *Ex parte Virginia*, 100 U.S. 339, 345 (1879). This power includes the ability to abrogate the States' Eleventh Amendments immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). ("Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for

private suits against States or State officials which are constitutionally impermissible in other contexts.").

The ADEA is clearly an appropriate preventative and remedial exercise of Congress' Section 5 power under the standards of *City of Boerne*. The statute does not, as the University argues, create a right that the Constitution does not already protect. While age discrimination is not subject to strict scrutiny review, it is subject to rational basis review. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *Vance v. Bradley*, 440 U.S. 93, 97 (1979). It is, moreover, clear that "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most differential standard of review." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 83 (1988); *see e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). Through the ADEA, Congress was simply providing a remedial and preventative legislative scheme to address wrongful age discrimination – Congress was not creating or changing a substantive right.

CONCLUSION

For all of the reasons stated herein, Respondents request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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